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Document rédigé par
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Pour le Collège des Notaires d'Australie et de Nouvelle-Zélande

(disponible en anglais uniquement)

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ASPECTS OF THE APOSTILLE CONVENTION

A Position Paper prepared by
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for The Australian and New Zealand College of Notaries

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OUTLINE

This paper has been prepared to assist the deliberations of the Hague Conference on Private International Law Special Commission of November 2012 on the practical operation of the *Apostille Convention*.

After noting the success of the Convention, the paper considers several aspects of the Convention's practical application which arise from the Responses to the Permanent Bureau's Questionnaire of January 2012. They include the exclusion of "administrative documents dealing directly with commercial or customs operations" from the ambit of the Convention, the applicability of the Convention to copies of public documents and translations and the progress of the electronic apostille programme. The paper also revisits issues concerning the language of apostilles, the affixing of apostilles, the authentication of academic diplomas and documents and the need for ongoing education campaigns for and by Competent Authorities.

Two special appendices which briefly discuss the office of notary in the civil law, common law and USA jurisdictions and notarial acts in authentic and private forms are appended to the paper.

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The Australian and New Zealand College of Notaries

The College is a trans-Tasman organisation of notaries committed to providing the highest standards of notarial practice through excellence in education, professional development and support for its members.

Full membership is open to all practising Australian and New Zealand notaries.

Any notary holding office in any place outside Australia and New Zealand who is not qualified to be a member may be admitted as an associate of the College.

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ASPECTS OF THE APOSTILLE CONVENTION

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The Australian and New Zealand College of Notaries is honoured to have been granted Observer status at the Hague Conference on Private International Law Special Commission of November 2012 on the practical operation of the *Apostille Convention.* The College presents its compliments to the Special Commission.

Introduction

As part of its preparation for the Special Commission, the Permanent Bureau of the HCCH prepared and circulated its Questionnaire of January 2012 concerning the operation of the *Apostille Convention* ("**the Questionnaire**").

Thirty-seven of the Contracting States and six non-Contracting States responded to the Questionnaire in sufficient time to enable the Permanent Bureau to prepare its synopsis of responses to the Questionnaire as at 14 September 2012 ("**the Responses**").[1] There is no reason to suppose that the Responses are not properly representative of the views of all the Contracting States in relation to the practical operation of the *Apostille Convention* during the three years since the 2009 Special Commission (**SC 09**).

A number of important issues have emerged from the Responses. The purpose of this paper is to provide material and commentary in relation to several of those issues in order to assist the Special Commission in its deliberations.

The Australian and New Zealand College of Notaries takes this opportunity to extend its congratulations and thanks to the Permanent Bureau and its staff for the exceptional quality of the preparatory work for the Special Commission.

The success of the Apostille Convention

Since its entry into force half a century ago, the success of the *Apostille Convention* has been remarkable. It is the most widely ratified and used of all the Hague Conventions. In 2010, over 10 million apostilles were issued in (then)100 contracting states around the world.[2] In the same year, when surveying foreign direct investment regulation across 87 economies, the World Bank acknowledged the positive impact of the *Apostille Convention* on the ability of foreign investors to start up businesses in those countries which were party to the Convention.[3]

At the Third Regional Meeting of the e-APP for Europe project held in Paris on 4-5 October 2011 (which coincided with the commemoration of the 50th Anniversary of the *Apostille Convention*), the participants noted

> [T]he invaluable and ongoing contribution of the *Apostille Convention* to the international circulation of public documents and the important advantages it brings to individuals and businesses in the course of their cross-border movements and activities.[4]

Administrative documents dealing directly with commercial or customs operations

"Administrative documents dealing directly with commercial or customs operations" are excluded from the ambit of the Convention.[5]

Judging from the Responses, determining the parameters of that exclusion is causing a degree of angst within the Competent Authorities of quite a number of Contracting States as they attempt to balance the requirements of the Convention and the commercial needs of their own countries' exporters.

Given the apparent complexities of the problem, it is useful to take a moment to look at the background.

At the very heart of the exclusion was the practice, now largely done away with, adopted by most countries of imposing a consular transaction requirement in relation to imported goods being

> [T]he procedure of obtaining from a consul of the importing … [country] … or the territory of a third party, a **consular invoice or a consular visa** (*emphasis added*) for a commercial invoice, certificate of origin, manifest, shippers' export declaration or other customs documentation in connection with the importation of the good[s].[6]

A "consular invoice" or a "consular visa" is a document obtained from a consular officer of the country to which goods are to be shipped which sets out particulars of the consignor, the consignee and the value of the shipment as well as providing a detailed statement of the goods being shipped.

Although originally designed to serve the economic interests of trading nations, over a period of time the practice of issuing consular invoice ossified as consulates sought and obtained excessive fees for the service and processing delays became commonplace.

From the early years of the 20th century, members of the international trading community began to wage a campaign to rid themselves of administrative, procedures and formalities (such as consular invoices and consular legalisation generally) which they viewed as hindering the conduct and development of world trade.

By the 1950s, organisations dedicated to trade and commerce such as the International Chamber of Commerce and the General Agreement on Tariffs and Trade (GATT) (now the World Trade Organisation) had achieved a deal of success in bringing about the simplification of a number of the administrative procedures and formalities which were troubling the traders.[7]

In the light of the momentum which had been built, it is not really surprising that when they allowed the exclusion, the delegates to the Ninth session of the Hague Conference who drafted the *Apostille Convention* were endeavouring to be seen as being responsive to the perceived needs of the international trading community.

Even so, they formulated the exclusion in a very general way. As the Convention's rapporteur, Professor Yvon Loussouran noted in his Explanatory Report,

> The Commission nonetheless wanted to avoid the exclusion, once accepted, being given too general a meaning.[8]

It is important to bear in mind that by its wording, the exclusion does not relate to all documents which may be from time to time directly concerned with "commercial or customs operations". It only relates to "*administrative documents*" and then not to the full range of documents which could possibly be so described.

"*Administrative documents*" are of course among the documents deemed to be public documents for the purposes of the Convention. Whenever considering whether a particular document falls into that category, it is always helpful to turn to the definitive French language text of the Convention for guidance.[9]

The expression "*les documents administratifs*" where appearing in paragraphs 2 and 3 of Article 1 is poorly translated as "*administrative documents*" in the English language text. The latter expression is woolly and imprecise and is not a term of art.[10]

On the other hand, "*les documents administratifs*" is a well understood legal descriptor of various classes of documents issued by government and government institutions. It does not include private "administrative" documents relating, in this case, to trade and customs matters. Nor does it include documents issued by non-government organisations (such as Chambers of Commerce) which may be recognised by government, no matter how prestigious or important those organisations may be in the world of trade.

Even if a document is on its face, a "*document administratif*", it must also pass a specific test before it can be excluded from the operation of the Convention. It must have been brought into existence directly for the purposes of particular "commercial or customs operations" and not merely be a document which partially or on occasion may be used for international trade purposes.

As Professor Loussouran also observed in his Explanatory Report

> … the adverb "directly" tends to restrict the exclusion solely to documents whose very content shows that they are intended for commercial or customs operations, thus excluding those which may occasionally be used for commercial operations such as certificates by the Patent offices (authenticated copies, documents certifying additions to patents, etc.).[11]

While significant legally and commercially, "*administrative documents*" represent a relatively small proportion of the myriad of commercial, administrative and regulatory documents now associated with international trade and commerce.

The Questionnaire sought specific responses from Contracting States in relation to a limited sample of documents. That sample comprised both "*administrative documents*" (Export and Import Licences, Health and Safety Certificates and Certificates of Product Registration) and international trade documents typically issued by non-government sources (Certificates of Origin, Certificates of Conformity, End User Certificates and Commercial Invoices).

To the extent that documents used in international trade and commerce originate from private or non-government sources, they do not fall within the exclusion. As a general rule, they may readily be notarially authenticated. Apostilles may then be affixed to notarial certificates in the ordinary course.

To the extent that documents are indeed "*administrative documents*", technically they ought not have apostilles affixed to them. If however, as so often happens, persons or institutions in an importing country require a document to be "authenticated" before acceptance, then the authentication may be provided by a notary. In turn, an apostille may then be affixed to the notary's authentication which is a public document in its own right.[12]

Copies of public documents

Across the board, the documents known generically as 'civil status documents' or 'vital records' comprise the largest group of documents for which apostilles are required. Whether or not copies of those or other public documents may have apostilles affixed to them is a vexed question, the answer to which varies between countries. In the USA, the answer varies between the 56 U.S. states and territories.

It should go without saying that a simple photocopy of any public document, including a civil status document, should not be capable of having an apostille affixed to it. The possibilities of forgery are too great for the risk to be taken, whatever the source of the copy.

In many countries, original civil status records and other public documents are permanently kept by their official custodians. Only certified copies of the records are ever issued to members of the public. In those cases the "certified copies" are, for all practical purposes, treated as originals and apostilles may readily be affixed to them.

Copies of public documents certified by notaries form a separate class of their own. Certifying copies of documents of domestic or foreign origin is probably the most common service that notaries around the world are called upon to provide for international purposes.

It is accepted in virtually every country other than the United States, that their own notaries have the power to certify copies of public documents, including copies of civil status documents. In almost every jurisdiction, apostilles are routinely affixed to notarially certified copy documents, subject always to the proviso that an apostille relates to the notarial certification and not to the underlying document. However, given the degree of trust reposed in notaries and in their acts, notarially certified copy documents are, for the most part, accepted everywhere as the functional equivalents of the original documents.

The principal exception to the rule is found in the USA. The power of American notaries to perform what is perceived internationally to be a simple, basic notarial service is often heavily circumscribed - to the point where sometimes the service cannot be provided at all, or an ersatz certification is prepared which may not be acceptable for use in the country in which it is to be produced.

Save for a general, but not identically formulated restriction on certifying copies of domestic vital records and other public documents, there is no policy consensus or legislative consistency in relation to the power of American notaries to certify copy documents.[13]

Translations

Question 6.5 of the Questionnaire which related to the application of the Convention to translations of public documents elicited some unexpected Responses.

Even though determining precisely which documents are 'public documents' must be left to the State from which the documents emanate, a simple translation of a public document cannot by its very nature possibly be itself a public document. To allow it to be so effectively means that, potentially, an apostille could be affixed to a document purporting to be a translation prepared by anybody within or without the jurisdiction. It is therefore surprising that any Competent Authority in any Contracting State would, even for a moment, consider that the Convention could apply to a simple translation of a public document.

Does it make a difference if the translation is prepared by an "official" or "accredited" or "sworn" translator? Despite the number of Responses received which say that it does make a difference, it is respectively submitted that in the majority of cases it should not.

Merely because a translator holds a state issued or state sanctioned credential or is in some way "recognised" by a government or semi-government authority, does not automatically mean that the translator's translation of a public document, or for that matter any other document, should be deemed to be a public document in its own right.[14]

Official recognition of competence or the grant of a state regulated or issued credential only means that the translator has been accorded professional status or has received particular training.

On the other hand, if a person, however qualified, is employed by the state as a translator or possibly even engaged in that capacity on an *ad hoc* basis, the position is quite different. In those circumstances a translation of a public document from or into the official language of the state which is made or verified by that translator is capable of being classified as a public document.

In every other case where a translation is required, the only appropriate methods of admitting the translation to the record as it were, are to either have the translation made or verified by a suitably qualified notary or to have the translator make an affidavit or sworn statement in the presence of a notary as to the accuracy of the translation that he or she has made or verified. In either event, an apostille may properly be affixed to the notary's certification.

By way of footnote to the issue. It should be carved in stone on the desk of every official who affixes apostilles to documents, that a translation is not a discrete document in itself. To have any meaning at all, either the original document which has been translated or a certified copy of it must be appended to the translation. The translator must make it clear in a covering affidavit, sworn statement or official certificate (as the case requires) that the translation is a true and fair translation of the translated document. It is a matter of concern how often this fundamental rule is breached.

The electronic future

The introduction of the electronic Apostille Programme ("e-APP"), an initiative of the Hague Conference and the National Notary Association of the United States, is undoubtedly the most important recent innovation relating to the future of the apostille.

The programme has two independent components

- the electronic register (the e-Register) and
- the electronic Apostille (the e-Apostille)

which may be implemented together or individually.[15]

Officially launched in April 2006, the move towards implementation is gradually gathering momentum. As at April 2012, approximately 154 Competent Authorities in 13 Contracting States had implemented or were in the process of implementing one or both of the e-APP components in all or parts of their territories.[16]

Nonetheless, even though most Contracting states are alive to the e-APP and its potential, the Responses indicate a degree of reticence on the part of many states to embrace the programme. The concerns which have been expressed are important and understandable; particularly those relating to legal and privacy issues. Technical challenges as they relate to electronically attaching apostilles to documents to be circulated in cyberspace are palpable and daunting.

Despite the fact that since SC 09, digitally signed documents, including notarial acts, are increasingly being used for purely domestic purposes in many countries, there is presently no significant demand anywhere in the world for electronic public documents, including electronically notarised personal and commercial documents, to be circulated or transmitted abroad in electronic form.

While specifically recognising the advent and importance of the e-APP, the United Nations Commission on International Trade has relatively recently commented that:

> Legal and technical incompatibilities are the two principal sources of difficulties in the cross-border use of electronic signature and authentication methods … Technical incompatibilities affect the interoperability of authentication systems. Legal incompatibilities may also arise because the laws of different jurisdictions impose different requirements in relation to the use and validity of electronic systems and authentication methods.[17]

How long it will take for electronic apostilles to become a norm is still a matter for speculation. However, in the short to medium term, it seems unlikely that affixing electronic apostilles to electronic documents will be an everyday occurrence.[18]

On the other hand, the implementation of an e-Register is a process no Contracting State or Competent Authority should shy away from. The technology is inexpensive and simple. Inputting data into an e-Register is neither difficult nor time-consuming. Developing an e-Register associated with a simple website established and controlled by the issuing Competent Authority affords recipients of documents bearing apostilles the opportunity to readily search the register to confirm whether or not an apostille is genuine.

Language of the apostille

The Convention specifically provides in Article 4 that the apostille may be drawn up in the official language of the authority (i.e. the country) which issues it. The Article goes on to say that the standard terms appearing in the apostille may be in a second language as well.

Particularly in circumstances where apostilles are drawn up in languages which are not readily accessible to most people, it is appropriate for an apostille to also have its standard terms and its inserted text written in a second language.

The two official languages of the Convention are French and English. Either language may appropriately be used as the second language for apostilles. The important thing to remember is that apostilles are designed to be used outside the countries in which they are affixed and that recipients must be able to comprehend them.

A number of bilingual and trilingual model apostilles have been developed by the Permanent Bureau and may readily be accessed on the HCCH website.

Affixing an apostille

The *Apostille Convention* does not stipulate a method of affixing apostilles to public documents. The 2003 Special Commission noted the wide variety of means utilised by different states for affixing apostilles as follows:

> These means may include "rubber stamp", glue, (multi-coloured) ribbons, wax seals, impressed seals, self-adhesive stickers etc. … [when the apostille is attached to the public document as a separate document, referred to in the treaty as an "allonge"] … these means may include glue, grommets, staples etc.[19]

After having described the different methodologies, the Special Commission decided to leave the matter in the hands of the individual countries after commenting that "all these means set out above … [are] … acceptable under the Convention.[20]

In a letter sent to the National Association of Secretaries of State on 9 July 2004, the U.S. Department of State wrote, among other things:

> … as a practical matter, many foreign courts expect to see Apostilles attached with a fair degree of formality. To the extent that pre-printed Apostille allonges are used, it is essential that you consider using special anti-fraud watermarked paper, stick-on gold seals, and/or wet signatures, and that you **employ a staple or grommet system that is fraud-resistant** (*emphasis added*). All Apostilles and allonges should be permanently affixed to the public document by the state issuing authority and not by the customer.[21]

The 2003 Special Commission erred in its decision. It should have strongly recommended that any means of affixing an apostille in a manner which enables it to be readily detached from the public document to which it relates is unacceptable practice which would entitle a receiving state to refuse acceptance.

Unfortunately, SC 09 did not take the opportunity afforded to it to put the issue to rest. It merely encouraged "the use of methods that would evidence any tampering with the method of affixation".[22]

It is clear from a comparison of the Responses and the responses to the 2008 Questionnaire that during the past three years, with a few notable exceptions, Competent Authorities have become far more conscious of the need to ensure that apostilles are affixed in a tamper-evident manner.

Even so, it is respectfully submitted that this Special Commission should bring the matter to a close by resolving that affixing an apostille to a public document by a non-tamper-evident means is unacceptable practice.

The authentication of academic credentials

Diplomas and other educational documents are said to comprise the third most frequently requested group of documents for which apostilles are required.

In the light of the level of corruption and malpractice known to exist within the education sector at large and particularly within the tertiary sector, SC09 devoted not inconsiderable time to the problem of the authentication of academic credentials. The Special Commission expressed its deep concern about the real danger of damage to the Convention caused by the increasing use of Apostilles by diploma mills in attempts to legitimise themselves and their products.[23]

Forged and bogus academic credentials are a small, but increasingly significant, aspect of fraudulent practices in the education sector which, rightly, are cause for concern - both for those called upon to authenticate credentials and those to whom authenticated credentials are ultimately produced.

Unfortunately, the problem is no closer to being resolved. Indeed, the expected increases in world tertiary student numbers from present estimated levels of 130 million to more than 260 million by 2025,[24] and in the numbers of students travelling abroad to study expected to rise from about 2.7 million to 8 million by 2025 serves to put greater pressure on Competent Authorities to "get it right".

Perversely, the very success of the apostille as a means of authentication of public documents when combined with the fact that members of the public generally (and regrettably, many bureaucrats and others in positions of authority in Contracting States) do not appreciate the limited function and effect of an apostille, resulted in the Permanent Bureau warning that the practice of Diploma Mills encouraging the use of apostilles

> … to lend an air of legality and validity to … [their bogus credentials] … may … eventually undermine the effectiveness and therefore the successful operation of the Apostille Convention.[25]

In Preliminary Document 5 presented to SC 09 the Permanent Bureau canvassed the question of the authentication of academic credentials at length. The Australian and New Zealand College of Notaries continues in its full support of the conclusions of the Permanent Bureau as set out in Preliminary Document 5.

It is convenient and appropriate to reiterate the observations previously made by the College in relation to the authentication of academic credentials, viz.

- It should not be forgotten that the overwhelming number of academic credentials presented for authentication are genuine. Authentication procedures must therefore primarily be geared towards accommodating the needs of those who require apostilles to be affixed to legitimate documents and copies of them.
- As far as is possible, the temptation to affix apostilles to testamurs of degrees or diplomas should be resisted, despite the requests of people and institutions in receiving countries. Experience has shown that original testamurs, if handed over to people in another country, are more often than not lost. When that occurs, the blame invariably lands at the foot of the Competent Authority or notary who authenticated the original document in the first place for not refusing to authenticate the testamur and for not insisting upon an authentication of a notarised copy instead.
- Notarised copies of academic credentials are almost always accepted around the world, even in those countries where the proposing end users of authenticated credentials have begun by requesting authenticated original documents.
- If there were ever an argument for the addition of explanatory text to supplement the apostille, it exists in relation to apostilles affixed to authenticate academic credentials. By adding supplementary text to the effect that the apostille does not verify the truth or accuracy of information contained in a document, in one fell swoop, the basis identified by the Permanent Bureau upon which certain diploma mills seek to obtain "an air or legality and validity" for their documents is swept away.

A number of Competent Authorities appear to be refusing to affix apostilles to notarially certified copies of academic credentials, if the notary does not certify the authenticity of the particular credential. There are more than 17,000 institutes of higher learning in the world. That number is increasing annually. Notaries are not credential evaluators and ought not be expected to certify the validity of copies of academic credentials presented to them for certification.

Credential evaluation is the function of the ultimate recipients of the certified copies. It is completely inappropriate and unreasonable for them to attempt to abrogate their responsibilities to notaries or to Competent Authorities.

The need for ongoing education

It is evident from the Responses that all Contracting States are conscious of the need to provide continuing education in addition to induction training for the staff of their Competent Authorities. It is also evident that there is no consensus as to the type, style or frequency of educational activities provided.

Quality induction training is essential to ensure that new staff members not only have the necessary skills to carry out their tasks efficiently, but that they also have an appropriate theoretical background to support their roles. In that regard, materials published by the Permanent Bureau (including Preliminary Document No. 2 - *Draft Apostille Handbook*) are invaluable resources.

Competent Authorities should take the time and trouble to develop a comprehensive continuing education programme for staff members, perhaps to be presented over a three year cycle, to enable both front and back office staff to maintain, develop and update their performance, knowledge and skills.

Programmes need not be lengthy, complex or expensive. Where possible, important stakeholders such as the notariat, tertiary education authorities and officials associated with the generation of civil status documents should be involved in the preparation and presentation of induction training and continuing education.

As with all private and public sector organisations, it is always appropriate for specialist units such as Competent Authorities to undertake periodic assessments of their operations and the service levels they provide.

Key issues to be considered in any analysis would include

- whether current procedures accord with the legitimate expectations and requirements of the public and the stakeholders
- what inefficiencies and bad practices exist
- how may procedures be standardised across a number of Competent Authorities (if there are more than one) within the Contracting State
- what factors limit or restrict the organisation's ability to meet its desired performance levels
- what specialist advice or services can be called up to assist the organisation.

It should not be assumed that once a country has acceded to the *Apostille Convention* and has announced its accession and subsequently the entry into force of the Convention in its official government media, all its public servants, lawyers, bank officials, public institutions and authorities, let alone the public generally, will immediately be familiar with the apostille system or even be aware that it has replaced consular legalisation of public documents emanating from other Convention countries.

It should also not be assumed that all or any of those persons have even heard of 'legalisation' in any form or if they have, that they understand the difference between consular legalisation and the affixing of apostilles or appreciate that for the foreseeable future, the two systems will both operate side by side depending upon the origin or destination of documents.

The task of educating institutions and persons who advise the public in relation to apostilles and the need for the authentication of public documents emanating from their own country for production abroad and, just as importantly, vice-versa, is substantial, ongoing and time consuming. Assistance in disseminating information to the public as well as to their own members and staff, may be obtained from societies of notaries, bar associations, professional bodies for accountants and bankers' associations.

The Hague Conference International Centre for Judicial Studies and Technical Assistance ("**the HC International Centre**"), possibly in association with experienced NGOs and experts, is a first class resource which is available to help facilitate the implementation of the Convention in States which will accede to the Convention in the future and to assist in the maintenance of appropriate standards and policies in those States where the Convention has already entered into force.

The establishment of the HC International Centre in 2007 was a major initiative by the Hague Conference and deserves the support of the Contracting States.

Ultimately, the onus must be on the Competent Authorities of each Contracting State to be proactive when it comes to education both initially and on an ongoing basis.

It is also appropriate that periodically, regional discussion workshops be held under the auspices of the Permanent Bureau or the HC International Centre to enable a frank exchange of views to take place in a collegiate atmosphere, with a view to harmonising practices and policies in relation to the operation of the *Apostille Convention*. In that regard, the College notes the valuable work undertaken at the four HCCH Asia Pacific Conferences held to date, in Malaysia (2003), Australia (2007), Hong Kong (2008) and the Philippines (2011) respectively.

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1 The Questionnaire and the individual Responses may be found at the 2012 Special Commission page of the apostille section of the HCCH website <www.hcch.net>

2 Response of the Hague Conference Permanent Bureau of 10 May 2011 to the European Commission Green Paper, Less bureaucracy for citizens : promoting free movement of public documents and recognition of the effects of civil status records (Released 14 December 2010) Found at <www.hcch.net>

3 The World Bank Group, *Investing Across Borders* 2010 (Washington DC).

4 Conclusion & Recommendation No 1 of the Meeting.

5 *Apostille Convention*, Article 1, paragraph 3(b).

6 E Moïsé, T. Orliac and P. Minor, *Trade Facilitation Indicators : The Impact on Trade Costs* (OECD Trade Policy Working Papers, No. 118, OECD Publishing. 2011) 26.

7 See for example, *Review of the Recommendations to abolish Consular Formalities*, Paper L/721 of 29 October 1957, distributed to the Contracting Parties at the Twelfth Session of GATT.

8 Yvon Loussouran, *Explanatory Report on The Hague Convention of 5 October 1961 Abolishing the requirement of Legalisation for Foreign Public Documents* (HCCH Publications 1961), commentary on the third sub-paragraph of Article 1.

9 The execution clause of the Convention provides as follows: "Done at The Hague the 5th October 1961, in French and in English, **the French text prevailing in case of divergence between the two texts** (*emphasis added*) **…**

[10] There are now some 17 different translations of the Convention which may be found at or accessed via the Hague Conference website. Without seeking to be rude or churlish, it is fair to ask whether those translations were based on the French version of the Convention and to question the extent that in relation to the exclusion the translations truly and fairly translate the meaning and purport of "*les documents administratifs*".

[11] Yvon Loussouran, above n 8.

[12] A good example is a Certificate of Pharmaceutical Product for a Solely Export Medicine which is issued by Australia's Therapeutic Goods Administration. That Certificate is unquestionably an "administrative document" dealing directly with commercial or customs operations. As such, it is excluded from the ambit of the Convention. However, institutions in almost every South American country to which certificates of this nature are sent normally require the Certificates to be authenticated before they may be used at the destination. Invariably, notarial authentications to which apostilles are affixed are accepted without question.

[13] For a detailed examination of the power of American notaries to certify copy documents, including vital records and other public documents see Peter Zablud, *Notarizing for International Use* (The Notary Press 2012), Chapter 6.

[14] If it were so, it would follow that any person who holds a state issued credential or licence in any field in the particular state could potentially, as of right, prepare and execute a document in his or her field of expertise, which would be entitled to have an apostille affixed to it.

[15] Details of both components may be found on the e-APP website <www.e-app.info>.

The site provides information about both components as well as a memorandum on some of the technical aspects underlying the suggested model for the issuing of e-Apostilles.

[16] An implementation chart which is updated periodically may be found in the e-APP website.

[17] *Promoting Confidence in Electronic Commerce : legal issues on international use of electronic authentication and signature methods* (United Nations Publications, Vienna 2009) 67.

[18] For those of us old enough to remember telexes and their overnight demise when commercial fax arrived on the scene, questioning the future utility or ubiquity of electronic public documents and their electronic authentication is, in the immortal words of Sir Humphrey Appleby, "very courageous".

[19] 2003 Special Commission Conclusion No. 16.

[20] Ibid.

[21] Department of State letter regarding electronic records and formality of apostille (July 9, 2004). Found at <www.state.gov/s1/2004/78075.htm>

[22] Conclusion and Recommendation No. 91 of SC 09.

[23] See Conclusion and Recommendation 84 of SC 09.

[24] See University World News Issue 209 of 19 February 2012.

[25] Preliminary Document 5, *The Application of the Apostille Convention to Diplomas including those issued by Diploma Mills*

APPENDIX 1

AN INTRODUCTION TO THE NOTARIAT

As the *Apostille Convention* includes notarial acts and notarial authentication of signatures in its definition of Public Documents, it is appropriate to provide the Special Commission with a short introduction to the office of notary in the civil law, common law and United States jurisdictions.

AN INTRODUCTION TO THE NOTARIAT

The office of notary

Since the invention of writing, the methods utilized by legal systems and sovereign entities to meet the challenge of ensuring the reliability and authenticity of their own records and those of their citizens have been many and varied. They have included the use of seals,[1] the registration of documents,[2] the testimony of witnesses,[3] and even the introduction of a new branch of linguistic scholarship known as "philology" which involved the study of the language, form and historical content of the documents which comprised the record.

Of all, the method that has stood the test of time, has been the creation of the office of notary and the reposing of trust and confidence in the holders of the office and in their official activities.

The concept of the state authorising independent specially trained professionals of undoubted integrity to prepare and archive reliable and authentic documents for itself and its citizens, arose in Roman times.[4] It developed in the city states of central and northern Italy and then found its way throughout Europe.[5] Two millennia later, the notary as the holder of an office of absolute trust exists in one form or another in virtually every country of the world.[6] While differing in status, function and number from country to country, the common denominator uniting all notaries is the high level of trust accorded to them and their acts both at home and abroad.

Notaries are unlike any other functionaries. As the then Lord Chancellor of England, Lord Eldon said over 200 years ago, (and it is still true today):

> By the law of nations, a notary has credit everywhere.[7]

The civil law notariat

The notariat is at its most influential in those countries which adhere to the civil law legal system. Civil law is more widely distributed throughout the world than is the common law. It is the principal legal system in most of Europe, virtually all of Central and South America and significant parts of Asia and Africa. In North America, pockets of the civil law continue to flourish in Louisiana, Puerto Rico and Quebec.

One of the distinguishing features of the civil law is the central role played by notaries within the system. Notarial acts prepared by notaries in "authentic" or "public" form are public documents which are automatically granted *publica fides* ("public faith").[8] They therefore carry absolute probative force in relation to statements and matters recorded in them.[9] The status thus accorded by the state to notarial acts both reflects and is reflective of the status accorded to the notaries themselves.

As a necessary concomitant of the probative force given to authentic form notarial acts, civil law systems typically also grant them executory force. Where a notarial act records an agreement or obligation, the act itself is enforceable in the same manner as if it were a judgement of a court.[10]

In addition to acts in authentic form for domestic purposes, civil law notaries also prepare and complete notarial acts in "private" form for international use in much the same way as those acts are prepared and completed by common law notaries.

In civil law jurisdictions, notarial practice is rightly considered to be a specialist field. Candidates invariably must gain specialist qualifications and usually must undertake periods of service as employees before being eligible for appointment. For example, French notaries generally qualify for appointment in one of two ways. Senior staff members of notarial offices who have passed a principal clerk's diploma examination and who have had at least nine years experience in a notarial office (at least six years of which have been after completion of the diploma) are eligible for appointment if they pass a special entry examination. Alternatively, a university graduate who has also obtained a *Diplomes d'etudes superieurs de droit notarial* may apply for appointment after completing two years (four semesters) of practical training in a notarial office and after passing various examinations at the end of each semester.

Within their jurisdictions, the civil law notaries, and in particular the European and Central and South American notaries, are seen and see themselves, as being an indispensable component of the legal profession. They tend to be highly visible and well regarded professionals at the apex of their respective national legal systems. They usually enjoy state sanctioned monopolies in their areas of expertise.[11]

The common law notariat

The status, power and function of the civil law notary is not replicated in those jurisdictions where the legal system is based on the common law.[12] The emphasis in the common law jurisdictions has long been on the presentation of oral evidence in courts.[13] The civil law notion of documents prepared and authenticated by notaries having absolute probative and executory force is alien to the common law, as it flies directly in the face of the rule against hearsay.

In Australia and New Zealand and in other similar common law jurisdictions, including England and Wales, notaries are almost always lawyers in private practice who, when acting as notaries, exercise a separate but essential function of authenticating personal and commercial documents which are prepared or executed domestically, specifically for production and use abroad.

The appointment of notaries in common law jurisdictions other than the United States and the level of education required of them has, for a long time, been very much a mixed bag. Canada is a classic example. Notaries in British Columbia are well trained and highly regulated, but need not be lawyers. All of Ontario's 35,000 lawyers are entitled to apply for appointment and about half of them have done so. At the same time, Ontario has about 650 notaries who are not lawyers.

Until relatively recently, save in relation to scrivener notaries who genuinely were and are in a special and highly qualified class of their own, it was accepted in England and in most other common law countries that if a person were a senior practising lawyer, he or she would readily be able to conduct a notarial practice once appointed, armed only with a handful of precedents and supported by years of experience as a legal practitioner.

Following the fall of the Berlin wall and the opening up of world trade and investment, from the early 1990s governments in the common law jurisdictions which had previously paid scant attention to notaries, began to appreciate that notaries perform an important role which both facilitates international trade and commerce and assists citizens with families and interests abroad in conducting their personal affairs with a greater degree of certainty and efficiency.

An increased understanding of the necessity for specialist education for notaries followed. In England and Wales, it is now compulsory for prospective notaries to complete a university Diploma in Notarial Practice. In the Australian state of Victoria, the passage of the *Public Notaries Act 2001* with its mandatory education requirement has resulted in prospective notaries being required to complete a Professional Course in Notarial Practice offered by Victoria University's Sir Zelman Cowen Centre in order to be qualified for appointment to office.[14] For notaries who wish to take their studies further, from 2013 Victoria University will be offering a degree of Master of Notarial Studies.

Notaries in the USA

In America, a third and different category of notary arose; a ministerial officer with minimal power to exercise independent judgement, whose sworn duty it is to take acknowledgements, administer oaths and carry out a number of other acts, primarily for domestic purposes It is thought that at the end of 2011, there were approximately 4.9 million people holding commissions as notaries in the United States.[15]

American notaries may be, but usually are not, lawyers. Typically, they are drawn from support staff in a wide range of professions and businesses with a preponderance from areas such as accountancy, banking, real estate broking, insurance and legal practice, all of which deal with the myriad of documents prepared, signed, filed and processed every day in the United States.[16] Domestically, notarization has become a key element in the conduct of daily governmental, commercial and personal life, to the point where defective notarization can not only invalidate individual documents but in extreme cases, can also derail and invalidate entire transactions.[17]

Notaries are appointed by authority of state or territory legislation, generally by the Governor or Secretary of State. With the exception of Louisiana and Puerto Rico, where notaries are appointed indefinitely, notarial commissions are granted for fixed terms with a right of renewal. The average term is four years.[18] In most cases, qualifications are minimal. Typically, applicants must be over 18 years of age, be literate in English, be resident in the state or territory in which a commission is sought and be of good character, that is to say, not have any felony convictions at all or within a certain number of years before application. Increasingly, prospective notaries are required to undertake short courses of instruction before being eligible for appointment.

The many millions of documents notarised each year by American notaries for international purposes comprise the largest and most important cohort of documents emanating from any country in the world for use outside its borders.

However, the lack of appropriate legal training and qualifications combined with the ministerial nature of the office and the limited range of powers granted to American notaries continue to cause problems for them when they intervene in international commercial transactions. Particularly in Europe, business people and government agencies are often troubled by the nature and status of American notaries and not infrequently decline to accept American notarisations.[19]

'Civil law' notaries in the United States

For historical reasons, two enclaves of civil law notaries are found in the United States; the first in the state of Louisiana and the second in the territory of Puerto Rico. Louisiana notaries are descended from French antecedents and are given far reaching powers by the *Louisiana Civil Code*, including the power to prepare authentic acts in the traditional civil law manner. Puerto Rico is a civil law jurisdiction founded upon Spanish law. Its notaries are legal professionals who must be attorneys admitted to practice in Puerto Rico and who are authorized to practise as notaries by the Supreme Court of Puerto Rico.

In the late 1990s, the US states of Alabama and Florida pioneered the appointment of a new class of American notary, the members of which must be lawyers of at least five years standing who have undergone specialist training. In addition to exercising the powers of ordinary notaries in their states, 'Civil Law' notaries as they are known are entitled to issue 'authentic' instruments for use in jurisdictions outside the United States.

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[1] Michael Clanchy, *From Memory to Written Record - England 1066 - 1307* (2nd ed 1993) 308-317.

[2] From about the fourth century, the papal chancery kept registers of important church documents. In a *summa* dating from the last quarter of the twelfth century, one Huguccio, who was apparently then the leading canonical authority on forgeries, recommended that where there was doubt about the authenticity of a decretal, resort should first be had to the papal registers. (C Duggan, *Twelfth Century Decretal Collections and their Importance in English History* (1963). Cited by Clanchy, above, 323).

[3] Clanchy, above, 297.

Nearly all English charters of the eleventh and twelfth centuries listed witnesses to the transactions recorded in them who, if necessary, could be called upon to swear to the veracity of the documents and to the transactions themselves. Witnesses varied in number from the King's unique *Testo me ipso* (witness, myself) to 123 individuals named in an Agreement made in Kent in 1176.

Clanchy goes on to note that it was common for a scribe to conclude his list of witnesses with a phrase such as 'and may others who would take too long to enumerate', which, although useless for the purpose of future identification, nonetheless recorded the impressiveness of the occasion at the time. One Oxfordshire scribe dismissed the witnesses to a deed with the phrase 'whose names we have been prevented by tedium from writing'.

[4] During the last years of the Roman Republic, a new form of shorthand invented by Cicero's private secretary, Marcus Tullius Tiro, which became known as *notae tironianae* quickly found its way into common use among the Roman scribes. A scribe who became proficient in the new system because known as a *notarius*. Over time, the title came to be used by court officials in Rome who prepared resolutions, orders and other documents for sealing by the court.

The preparation of private documents such as wills, leases, partnership agreements and the like was the preserve of private professionals known as *tabelliones* (from the thin wax covered tablets known as *tabellae* on which letters and legal documents were written). The *tabelliones* employed scribes to take shorthand notes of clients' instructions.

It is not now known when and under what circumstances the professions of *notarius* and *tabellio* merged or when and why *tabelliones* generally became known as "notaries" in Europe. The merger probably began in the late eleventh century and was, for all practical purposes, completed in the mid-thirteenth century.

5 For a brief history of the European notariat, see Peter Zablud, "*Principles of Notarial Practice*", Psophidian Press, (2005), Cap 2.

6 Countries such as the Peoples' Republic of China and several of the middle eastern theocracies whose legal systems, had developed along philosophical lines unrelated to European traditions, have now found it appropriate to introduce notaries into their systems.

For example, in 1975, in Saudi Arabia, the *Law of the Judiciary* established the office of notary in that country. Notaries are state employees (Article 95) and documents issued by them have 'dispositive power' and are admitted in evidence in court without additional proof and may not be contested except on the ground that they violate the requirements of the Shari'ah principles or that they are forged (Article 96).

In the People's Republic of China, a public notary system was created in the early 1950s. It was abolished in 1957 and reinstated in 1978. In 1982, the State Council of the PRC promulgated the *Interim Regulation on Public Notary Services* as the legislation regulating notaries in that country.

An instrument which has been drafted and executed by one of the PRC's 3,000 notarial offices is akin to a public act. It is conclusive evidence that the recitals and agreements expressed in it are accurate reports of the parties' statements and agreements. It is also conclusive evidence that any fact that the instrument recites to have occurred in the presence of the notary did occur and any act recited to have been performed was performed. The faith and credit granted a notarized document has been called in socialist terms, 'a potent force for civilisation and order'. (Alex Low, *New South Wales Law Society Journal* March 1995, 44.

7 *Hutcheon v Mannington* (1802) 6 Ves 823.

8 The attribution of *publica fides* by the state to its judicial and administrative documents, i.e. its 'public' documents, is one of the key indicia of sovereignty and is of the essence in the conduct of government. In that context, 'faith' means complete trust, confidence and credence.

9 Entrusting notaries with the creation and execution of documents which will attain public faith places considerable responsibility on their shoulders. For example, in Germany, the Civil Code requires the intervention of a notary in the land transfer procedure to attract and invoke the so called 'public faith' protection of #892 of the Code which is the main indefeasibility of title provision in the German system. Only acquisition of property through *juristic acts* (i.e. the acts of notaries) is protected by #892. Failure on the notary's part will remove the entire transaction, even when registered, from the protection of #892. (Murray Raff, *Private Property and Environmental Responsibility - A Comparative Study of German Real Property Law* (2003) 227-229.

10 Enforceability may either be the result of specific legislation, as is the case in Belgium, France, Germany, Greece, the Netherlands and Portugal or of an agreement between the parties embodied in the instrument, as is the case in Italy.

11 Civil law or 'latin' notaries are found in some 78 countries throughout Africa, Europe, Asia, Central and South America and the former Soviet bloc. In North America, latin notaries are also found in Quebec, Louisiana and Puerto Rico.

For a comprehensive review of the development, nature and function of the latin notary, see Pedro A Malavet, *Counsel for the Situation: The Latin Notary, An Historical and Comparative Model*, Hastings International and Comparative Law Review Vol 19, No 3, Spring 1996, 389.

12 The common law jurisdictions include most of the members of the (British) Commonwealth of Nations and a number of other countries, including the United States and Ireland, which were formally British colonies or which fell within the British sphere of influence.

There are a several countries in the Commonwealth of Nations, such as South Africa, Mauritius and Vanuatu where Britain was not previously the dominant or the sole colonial power. As a result, those countries have tended to have hybrid legal systems which, in turn, have produced notaries who in many ways are closer to civil law notaries than they are to common law notaries.

13 See CR Cheney, *Notaries Public in England in the Thirteenth and Fourteenth Centuries* (1972), Cap 1.

14 In consequence, Victorian notaries are now among the best trained and most highly qualified notaries in the common law world.

For those notaries who wish to take their studies further, from 2013 Victoria University will be offering a degree of Master of Notarial Science.

15 For an overview of the origins and powers of American notaries, including military notaries, see Peter Zablud *Notarizing for International Use - A Guide for American Notaries, Attorneys and Public Officials* (The Notary Press 2012)

16 In 2007, the National Notary Association estimated that approximately one billion documents were notarized in the United States. That figure is obviously increasing annually.

17 Michael Closen and Thomas W Mulcahy. *Conflicts of Interest in Documents Authenticated by Attorney Notaries in Illinois*, Illinois Bar Journal (June 1999) 320 at n 23.

18 New York notaries are only appointed for two years. Notaries in California, South Dakota and West Virginia enjoy ten year terms, while Vermont notaries have terms which are effectively co-extensive with the terms of the superior court judges who appoint them.

19 Because the USA is an English speaking country and because English is the language of the common law, unfortunately there is a tendency in some civil law jurisdictions to lump common law notaries generally in together with American notaries. Difficulties can and do arise in consequence, which sometimes take a little time to resolve.

In the past, The Australian and New Zealand College of Notaries has been able to assist members in clarifying the distinction between themselves and their U.S. namesakes and in assuaging the concerns of people abroad.

APPENDIX 2

THE NOTARIAL ACT IN AUTHENTIC AND PRIVATE FORMS

This Appendix briefly explains the concept of the notarial act as it is understood in the civil law, common law and United States jurisdictions.

NOTARIAL ACTS IN AUTHENTIC AND PRIVATE FORMS

The notarial act generally

For present purposes, in all civil law jurisdictions and in all common law jurisdictions, other than the United States

- an **act** is an instrument that records a fact or something that has been said, done or agreed; and

- a **notarial act** is an act authenticated by a notary's signature and official seal, certifying
    - the execution in the notary's presence of a deed or instrument under hand; or
    - verifying one or more facts or things which the notary knows or has been able to satisfactorily prove.[1]

In the United States of America, it is necessary to distinguish a notarial act as defined above from a notarial act as typically defined in American legislation. In almost every United States jurisdiction, a notarial act is a function which a notary is authorised to perform, as opposed to a document or instrument which records that which the notary certifies has been done.[2]

Therefore, for example, in most countries the administration of an oath by a notary is an activity on the notary's part, but the recording of the administration of the oath in the jurat of an affidavit as certified by the notary's signature and seal, is a notarial act, albeit one of the simplest kind. On the other hand, within the United States, in the main, the administration of the oath is the notarial act and the jurat is merely a written statement confirming that the notarial act has occurred.

Categories of notarial acts

Outside the United States, all notarial acts necessarily fall into one of two categories, namely:

- **authentic** or **public form** acts; or
- other acts known in most common law countries as **private form** acts

Acts in "authentic form"

Also known as an act in "public form" and occasionally, as an act in "solemn form", the notarial act in authentic form had its genesis in Italy in medieval times. It comprises a single narrative instrument, written by the notary in the first person, which sets out or perfects a legal obligation or records some fact or thing. Because it has been prepared by a notary, it is conclusive and has full probative value in civil law jurisdictions where notarial acts automatically have full recognition.

In civil law countries, an act in authentic form has special evidentiary status and is usually automatically evidence of the facts and statements it records unless it is deprived of authenticity by a rarely undertaken, long and complex judicial procedure. A notarial act in authentic form does not, however, have probative force in relation to the facts which the parties have declared to the notary without evidencing them. That part of the instrument can be rebutted by ordinary means of proof.

In addition to its probative force, an authentic form notarial act also has executory force; that is to say, an obligation or acknowledgement appearing in a notarially authenticated instrument is enforceable in the same way as if it were a judgement of the court, even though no proceedings have been brought before a court.

Because they are legal practitioners and legal advisors, most common law notaries are able to prepare and complete authentic form acts for production abroad.

Save for American civil law notaries who comprise a special group very much in the minority, U.S. notaries do not have the power or authority to prepare or complete notarial acts in authentic form. This is so, even if the documents have actually been prepared abroad and sent to the United States for notarization.[3]

The elements of a notarial act in authentic form

A notarial act in authentic form

- begins with **a protocol** (preamble) which sets out introductory matters such as:
  - the notary's name and status;
  - the date and place of the notarial act;
  - the fact of the appearance of one or more persons (typically referred to as 'the appearer(s)') before the notary, often together with one or more witnesses; [4]
  - any capacity in which an appearer appears or is acting; and
  - the means by which the notary has verified any facts or statements set out in the act relating to the appearer(s)
- continues with the **corpus** (operative part) which
  - records any declarations made to the notary by the appearer(s) by way of explanation or recital;
  - sets out, also by way of declaration by the appearer(s), the terms of the power of attorney, contract, arrangement, obligation or other legal act which is embodied in the instrument; and
  - refers to any annexures or documents produced to or by the appearer(s); and
- ends with an **eschatocal** (concluding statement) by the notary which states:
  - that the document was read over to and acknowledged by the appearer(s), and signed and, where applicable, sealed by the appearer(s) in the notary's presence and in the presence of any witnesses who are present; and
  - where appropriate or required, that all the requirements of the applicable local law relating to the formalities of execution of the document and its binding nature have been met.

The document is then signed by the appearer(s) in the notary's presence and in the presence of any witnesses who also sign the document in each other's presence and in the presence of the appearer(s). The notary then signs and seals the executed document, although not necessarily in the presence of the appearer(s) or the witness(es), thereby making the document the notary's act.[5]

Acts in private form

A notarial act in private form is a certificate signed and sealed by a notary which evidences the notary's intervention and which is endorsed upon or appended to another document not usually prepared by the notary *qua* notary. Typically it relates to or deals with one or more aspects of the document such as its genuine nature or validity, its legal status and legal consequences or more often, the execution of the document and the verification of the identity, capacity and authority of the person(s) executing it.

Although their origins may be less auspicious and their preparation less formal and ritualistic than their 'authentic' kin, notarial acts in private form have an important function in modern commercial life and must be prepared by a notary with proper care as to their content and with due concern as to the consequences which flow from any negligent misstatement which might appear.

Regrettably, in some civil law quarters, there are notaries who think that acts in authentic form are the only true notarial acts and that the private form acts of the common law notaries are less worthy and of lower status as are, by extension, the common law notaries themselves.[6]

Those notaries would do well to remember that the majority of the acts which they actually prepare are acts in private form (known in France as acts "en brevet"), which are for production in jurisdictions outside their own. As with authentic acts, private form acts must be correctly and carefully prepared and completed.[7]

Acknowledgements

The quintessential notarial act in the United States is the taking of an 'acknowledgement' which is formal and official evidence of the proper execution of an instrument as a necessary precursor to admitting the instrument to public record.[8]

An **acknowledgement** is

> A notarial act in which a notary public certifies that a signatory, whose identity is personally known to the notary public, or proven on the basis of satisfactory evidence has admitted, in the notary public's presence, to having voluntarily signed a document for its stated purposes".[9]

Acknowledgement also means

> A declaration by a person that the person has executed an instrument for the purposes stated therein and if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of a person or entity represented and identified therein.[10]

An acknowledgement must be distinguished from an attestation, which is the act of witnessing the execution of a document and then signing the document as a witness. In taking an acknowledgement, American notaries do not act as witnesses to the execution of documents. If formal witnessing is required, that task typically falls to an independent person other than a notary.[11]

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[1] "Any certificate, attestation, note, entry, endorsement or instrument made or signed and sealed by a notary public in the execution of the duties of his office is a notarial act." (NP Ready, *Brooke's Notary* (Sweet & Maxwell 13 ed 2009), 75.

The former secretary of The Notaries' Society of England and Wales, AG (Tony) Dunford, has defined a notarial act as being 'a record of some activity which is intended and or required to have some evidential status, or some legal or administrative force or effect or some commercial effect'. (AG Dunford, *The General Notary*, (1999) 4).

[2] Unlike a number of states which were once administered by civil law colonial powers, both Louisiana and Puerto Rico still follow their French and Spanish antecedents and make the distinction between notarial acts on the one hand and the powers and duties of notaries on the other. See generally, *Louisiana Revised Statutes Title 35, Notaries Public and Commissioners* and *Laws of Puerto Rico Title 4, Puerto Rico Notarial Act.*

[3] Any American notary who wrongfully prepares or completes a notarial act in authentic form puts any transaction to which the document relates in immediate jeopardy. On one view, matters and things set out in the purported notarial act are a nullity *ab initio*, because American notaries, other than U.S. civil law notaries, do not have the training or status required to prepare or complete a notarial act in authentic form.

[4] Civil law jurisdictions often require one or more witnesses to be present in addition to the notary when certain documents, typically documents relating to real estate and inheritance matters, are executed.

[5] Requirements as to form are regulated to a greater or lesser degree in most civil law jurisdictions. For example, in Quebec, the *Notaries Act 2000*, among other things, sets out rules for notarial acts including rules relating to errors and omissions (s.37), forms and abbreviations (s.45), added words, letters or signs and words crossed out (s.46), inserts and additions (ss.47, 48 & 49), signing (s.50), reading over (s.51) and place(s) of execution (ss. 54 & 55).

Also see, for example, Part III, Title 1 of Malta's *Notarial Profession and Notarial Archives Act - Of formalities of Notarial Acts*, Article 51 of the *Notarial Law* of Italy and Chapter 9 of the Spanish Civil Code, *Reglamento Notarial.*

[6] Dunford has observed that the essentials of public and private form notarial acts are, in reality, the same, but the difference between them lies in the purpose to which a particular act is to be put in the jurisdiction in which it is to be used (Dunford, above n 1 45).

[7] Numerically, those notarial acts exceed acts in authentic form by a considerable number. Civil law notaries are just as prone to error when preparing acts in private form as are their common law brethren.

[8] The acknowledgement has formed the basis of many notarial acts in countries such as Vietnam, the Philippines, Korea and Thailand, where American influence is keenly felt.

[9] *Connecticut Annotated Statutes §3-94a. Notaries Public, Definitions.*

[10] *Illinois Annotated Statutes, Ch.5. §312/6-101. Definitions.*

[11] In some U.S. jurisdictions, it is possible to 'prove' a deed as an alternative to obtaining a signatory's acknowledgement. The procedure is sometimes called 'probating' a deed and involves one or more of the attesting witnesses making an affidavit that the person whose signature was witnessed acknowledged the instrument in the presence of the affiant(s) and any other attesting witness(es). See for example *Colorado Rev.Stat.Ann.Notaries Public §38-30-136* and *Iowa Code.Ann Iowa Law on Notarial Acts §558-31* and *558-32.*